

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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to: Associate Area Counsel
(Small Business/Self Employed)

from: Senior Technician Reviewer, Branch 5
(Procedure & Administration)

subject: Chapter 11 Post-BAPCPA Individual Debtors – Collection Issues

This responds to your request for assistance in answering a question from Insolvency regarding how the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) affects collection from individuals after default of a Chapter 11 bankruptcy plan.

ISSUE

For Chapter 11 cases of individuals filed after October 17, 2005, what factors affect the Service's ability to collect after default of the Chapter 11 plan?

DISCUSSION

Most of the provisions of BAPCPA became effective for bankruptcy cases filed on or after October 17, 2005. For post-BAPCPA Chapter 11 cases of individuals, there are potentially four aspects of the bankruptcy case that could limit the Service's ability to collect from the debtor after default on the Chapter 11 plan: (1) the discharge injunction, (2) the binding effect of the plan, (3) the stay of acts to collect prepetition debts, and (4) the stay of acts against property of the estate.

The Discharge Injunction

When a debtor who is an individual has defaulted on a Chapter 11 plan, Insolvency should first determine whether the debtor received, or will receive, a discharge. In post-BAPCPA Chapter 11 cases of individuals, unless the court orders otherwise for cause,

confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge upon completion of all payments under the plan. 11 U.S.C. § 1141(d)(5)(A). However, the debtor may seek a hardship discharge, similar to that in Chapter 13 cases, if the debtor paid as much to creditors as the creditors would have received if the estate of the debtor had been liquidated under Chapter 7. 11 U.S.C. § 1141(d)(5)(B). Both the general Chapter 11 discharge for individuals and the hardship discharge are subject to the same exceptions to discharge that apply in Chapter 7 cases of individuals; the exceptions to discharge in 11 U.S.C. § 523(a) apply.

The Binding Effect of the Plan

Once the debtor has defaulted on a Chapter 11 plan, the plan is generally no longer binding, but any applicable default provisions should still be followed. Insolvency should determine whether the confirmed plan or confirmation order contained any default provisions. The IRM directs the Service to try to have default provisions included in Chapter 11 plans. See IRM 5.9.8.5(7) and IRM 5.9.8.16.3(3).

The Stay of Acts to Collect Prepetition Debts

Even if the plan is no longer binding (and there are no default provisions), the automatic stay could still be an issue. It is important to determine when the stay ends. The stay against property of the estate ends at a different time than the stay against other acts. See 11 U.S.C. § 362(c). To determine whether the stay against acts other than acts against property of the estate is still in effect, such as acts to collect prepetition debts, Insolvency should determine whether any of the following three events that terminate this aspect of the stay have occurred. If more than one has occurred, Insolvency should determine which occurred first. The stay against acts other than acts against property of the estate ends upon the earliest of three events, (1) the time the discharge is granted or denied, (2) the dismissal of the case, (3) the closing of the case. 11 U.S.C. § 362(c)(2).

In some cases, the event that terminates the stay is the grant or denial of discharge. Again, BAPCPA made changes to Chapter 11 cases that affect when a debtor will typically be granted a discharge; section 1141(d)(5)(A) provides that the discharge in Chapter 11 cases of individuals will generally not be granted until the debtor completes all payments under the plan, but it is possible for the plan to provide otherwise. Also, the debtor may qualify for a hardship discharge in some cases.

In other cases, the event that terminates the stay is the closing of the case. It is a common practice in many jurisdictions is to close Chapter 11 cases shortly after confirmation (though it may make more sense for courts to keep them open in cases of individuals, as with Chapter 13 cases). If the case was closed shortly after confirmation, the stay against acts to collect prepetition debts ends at that time.

The Stay of Acts against Property of the Estate

Insolvency should also review the plan and confirmation order to determine whether the stay of acts against property of the estate still applies. The stay of acts against property of the estate does not end until the property is no longer property of the estate. 11 U.S.C. § 362(c)(1). Again, in some cases the bankruptcy court may close the bankruptcy cases shortly after confirmation. Unless the court orders otherwise, any property listed on the debtor's bankruptcy schedules that was not otherwise administered at the time of the closing of the case is abandoned to the debtor. 11 U.S.C. § 554(c). Further, while 11 U.S.C. § 1115, added by BAPCPA, provides that property of the estate in an individual Chapter 11 case includes the debtor's postpetition property and earnings, that provision is limited to such property acquired or earned by the debtor before the case is closed or dismissed. Once a bankruptcy case is closed or dismissed, therefore, the stay against acts to collect property of the estate no longer applies except as to prepetition property that was not listed on the debtor's schedules, which remains property of the estate.

In some cases, the bankruptcy court may not close the Chapter 11 case until after completion of all the payments under the plan. In such a case the relevant issue is what property is included in property of the estate after confirmation of an individual's Chapter 11 plan. A number of Code provisions bear on this determination and, absent an express provision in the plan or confirmation order, the result is not clear. Again, for post-BAPCPA Chapter 11 cases of individuals, the bankruptcy estate includes property interests and earnings from services acquired by the debtor following the bankruptcy petition date until the case is closed, dismissed, or converted. 11 U.S.C. § 1115. Also, debtors generally remain in possession of all property of the estate, except as provided in the plan or the confirmation order. *Id.* Generally, property of the estate vests in the debtor upon confirmation, unless otherwise provided in the plan or the confirmation order. 11 U.S.C. § 1141(b). And again, property of the estate that is not otherwise administered at the time of the closing of the case is generally abandoned to the debtor, unless otherwise ordered by the bankruptcy court. 11 U.S.C. § 554(c). (Property that was abandoned is no longer property of the estate.)

The enactment of section 1115 by BAPCPA created the same issue in Chapter 11 cases of individuals that courts have struggled with for years in Chapter 13 cases. In Chapter 13 cases, some courts have held that confirmation vests all property in the debtor, except property that is specifically retained as property of the estate in the plan or in the order confirming the plan. *See, e.g., Shell Oil Co. v. Capital Financial Services*, 170 B.R. 903, 905-906 (S.D. Tex. 1994). Other courts have held that while the property of the estate reverts in the debtor upon confirmation, such pre and postpetition property also remains part of the estate. *See, e.g., In re Brensing*, 337 B.R. 376, 383 (Bankr. D. Kan. 2006). Some courts have taken a middle ground, holding that by virtue of a statutory provision identical to section 1141(b), postpetition property acquired by a debtor that is not committed to the funding of a plan is not property of the estate. *See, e.g., In re Markowicz*, 150 B.R. 461, 462 (Bankr. D. Nev. 1993). More recently, certain courts have held that upon confirmation, all property of the estate vests in the debtor

and the estate once again begins to accumulate property by operation of a code section identical to section 1115(a). See, e.g., *Barbosa v. Soloman*, 235 F.3d 31, 37 (1st Cir. 2000).

We believe that the best view is that, in the absence of binding precedent or contrary language included in the plan or confirmation order (and unless the bankruptcy case has been closed or dismissed), the bankruptcy estate after confirmation is limited to the portion of the debtor's income or other earnings necessary to fund the plan. See, e.g., the Chapter 13 analog in I.R.M. 5.9.10.8.1(2). Of course, courts may disagree, so Counsel's advice should be sought when the issue arises. *Id.* If the plan provides that all of the debtor's property remains property of the estate, so that it is protected by the stay, the Service's only recourse may be to file a motion for relief from stay, or a motion to convert or dismiss, as appropriate. Whether conversion, rather than dismissal, is appropriate depends upon on such factors as whether there are assets remaining in the estate for unsecured creditors in a converted case.

Administrative Collection upon Default and the CSED

Generally, if the Service is not bound by the plan (including default provisions), any Chapter 11 discharge, or any aspect of the automatic stay, the Service could proceed with administrative collection remedies against the debtor to collect prepetition debts. Follow IRM 5.9.8.16.3. It is important to take special care in these cases to protect the collection statute expiration date (CSED). The statute of limitations on collecting a tax provided for by a confirmed Chapter 11 plan is extended under I.R.C. § 6503(h)(2) while the taxpayer is current on Chapter 11 plan payments for the tax, up until the time the taxpayer is in substantial default on the plan payments for the tax, plus 6 months. And, of course, the collection statute is extended for the time the Service is prohibited from collecting by the stay (plus the additional 6 months). But if a plan is no longer binding and the stay applies to estate property, but not the debtor and the debtor's property, the collection statute may not be tolled.

You also asked whether the model default language should be modified as a result of the enactment of BAPCPA. This language mirrors and expands upon the model language included in I.R.M. 5.9.8.14.2(3)(m) and specifically provides for the Service to begin administrative collection efforts upon the debtor's default. We think it is fine.

If you have any question, please contact the Office of Associate Chief Counsel (Procedure & Administration) Branch 5 at (202) 622-3620.